No. 230

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,267 and 12,269

ROY UNDERWOOD, Appellant

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers

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Nos. 12,268 and 12,270

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in their own behalf and on behalf of all members of Local 542 and its branches 542-A, 542-B, and 542-C of the International Union of Operating Engineers, Appellants

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, individually, and as representatives of and on behalf of the International Union of Operating Engineers

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Appeals from the Orders of the United States District Court for the Eastern District of Pennsylvania, Civil Actions Nos. 14,398 and 14,547

APPELLANTS' PETITION FOR REHEARING

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PETITION FOR REHEARING

Two actions are here involved. The first is by the elected president and business manager of a local union against the president of the international union, individually and as representative of the international, an unincorporated association, to set aside the international's action in improperly suspending plaintiff from office and imposing other harsh disciplinary sanctions. The other is by twelve officers and members of the local union against said international president and his appointed local supervisor, individually and as representatives of the international union, to set aside the supervision and control imposed upon the local union. After an adverse decision by the District Court, the plaintiffs appealed. This Honorable Court decided sua sponte that the actions should be dismissed for lack of jurisdiction.

Appellants, Roy J. Underwood (at Nos. 12,267 and 12,269) and Homer Dawson, Gerard Leone, James Russell, Robert Walsh, Colombo Acchione, Edmond Farmer, Michael

Concordia, Norman Gale, Stanley Kosiorek, Gerald Gilroy, Joseph Martin and Clarence Sweeney (at Nos. 12,268 and 12,270) respectfully pray your Honorable Court for a rehearing in this matter for the following reasons:

(a) that the issue of jurisdiction be reconsidered. This point was raised by this Honorable Court sua sponte, it not having been argued before this court nor the court below; and, in the alternative,

(b) that the order as to costs be reconsidered and that judgment be entered without costs;

(c) that the decision as to Civil Action No. 14,398, affirming the judgment below, be amended as set forth hereinafter;

(d) that the injunction entered by this court at Nos. 12,269 and 12,270 be continued in effect pending the action of this court upon the present petition.

I. Jurisdiction of the Court

This Honorable Court decided that in Civil Action No. 14,547, and in the major cause of action in Civil Action No. 14,398, there was no diversity of citizenship and, thus, no federal jurisdiction.

The basis of this decision was that F.R.C.P. 17(b) provides that capacity of an unincorporated association to be sued depends upon the law of the state where the court is sitting: that Pennsylvania law provides capacity to be sued, that such association must be sued as an entity, and that class action is prohibited (Pa. R.C.P. 2153),[1] that, in the absence of a class action, the citizenship of such unincorporated association is determined by the citizenship of all of its members, so that, there being no whole diversity between the plaintiffs and all members of the defendant union, there is no federal jurisdiction.

It is respectfully submitted that this Honorable Court has misconstrued the meaning and effect of F.R.C.P. 17(b), denied the equality between it and F.R.C.P. 23(a), and has, thus, attributed to the state rule an improper supremacy over the federal practice. The decision of this court is in direct

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1. Perhaps class action is prohibited as to association plaintiff (Pa. R.C.P. 2152), but not as to a defendant (Pa. R.C.P. 2153(a)) where the rule is permissive. The rule provides that in actions against associations "it shall be sufficient" to name as defendant either the association by its name. . .or any officer as trustee ad litem. . . ."

conflict with the intention behind the rules as expressed by the Advisory Committee on Federal Rules and the unanimous opinions of the accepted text authorities.

Federal Rule 17(b) was intended to add to the existing procedures in federal practice and not to deprive litigants of procedures which they already had, nor to subject existing federal jurisdiction to the state rules of practice. This rule and Rule 23(a) are in pari materia, and provide alternati methods of bringing unincorporated associations into the federal court. The Supreme Court Advisory Committee on Federal Rules refers[2] as authority for the intention of the rule and the need which it sought to remedy, to the article, "A New Federal Civil Procedure," by Dean (now Judge) Clark and Professor Moore[3] which points out that Rule 17(b) was intended to remedy those situations where federal jurisdiction was avoided because an unincorporated association could not be treated as an entity, so that jurisdiction depended upon diversity as to all members of the association. The new provision was intended to give litigants the benefit of

2. F.R.C.P. 17, Note to Subd. (b).
3. 44 Yale L.J. 1291, 1312-17.

state-created capacity where it overcame the obstacle to federal jurisdiction. They state, at page 1316:

> "The rule of this case (United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 66 L. Ed. 975) and of state procedural statutes which recognize as an entity those groups which act as units seems desirable. To be generally effective in cases where jurisdiction must be founded upon diversity of citizenship the new procedure should modify the present federal rules which refuses to endow such a unit with citizenship, but requires the citizenship of its members to be looked to."[4]

The authors then point out that "the class suit offered an avenue of escape at times, for in such a suit only the citizenship of the representatives is looked to." (p. 1316, note 109). It is without doubt that the writers of the rule

4. The article then discusses the benefits to be attained in treating an unincorporated association as if it were incorporated for citizenship purposes. This would solve the problem of the impossibility of obtaining diversity jurisdiction against a large or national association (pp. 1316-17 and footnotes).. See Amer. Fed. of Mus. v. Stein, 213 F.2d 679 (6 Cir.). This makes it clear that the intent of the authors of the rules was to broaden the opportunities to obtain federal jurisdiction heretofore limited because of state viewpoints.

were intent upon broadening the opportunities for federal jurisdiction by overcoming the obstacles of capacity.

The fact that the state law is referred to in aid of the federal rule to ascertain capacity cannot be used in derogation of another federal rule (F.R.C.P. 23(a)). To the extent that the state rule may determine capacity, it has effect. Thus, it is clear that an unincorporated association can, under Pennsylvania law, be sued, and, further, it can be entitled by its common name. This is not in conflict with the federal practice. However, the state practice may not be extended further, so that it might intrude into a field specifically covered by a federal rule (F.R.C.P. 23(a)) and act in derogation thereof.

In these views, the authoritative writers are unanimous.

Professor Moore, discussing the effect of Rule 17(b) upon unincorporated associations, states that, in diversity cases where the state rule gives the association capacity to sue or be sued in its common name, the citizenship of the individual members must be wholly diverse from the opposing

parties, so that in most cases federal jurisdiction is impossible. He continues:

> "The escape in such case has been, and must continue to be, the class action where only the citizenship of the representatives need appear."[5]

It is doubtless that the applicability of class action is considered wholly apart from the question of capacity; that, under any interpretation, the state rule as to class action is immaterial to the federal procedure which has its own thought in the matter and may not be frustrated in its intent.

Moore and Cohn assert that although Rule 17 provides that an association may, in certain instances, be sued as an entity, the class action "remains vitally significant in the federal courts." They state:

> "This is so, because even in the situations which fall within Rule 17 authorizing an unincorporated association to sue or be sued in its common name; Rule 17 can seldom be used except where federal jurisdiction is based upon a federal question, for when the jurisdiction

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5. Citing Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 148 F.2d 403 (7 Cir., 1954). 3 Moore's Federal Practice, p. 1412-13, quoting his article, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft," (1937) 25 Geo. L.J. 551, 566, referred to by the Rules Committee as authoritative. Note to F.R.C.P. 23(a)(1).

> is founded upon diversity of citizenship, the citizenship of all the members must be made to appear and their citizenship must be diverse from the opposing party: although suable as an entity, no citizenship has been accorded the unincorporated association." Federal Class Actions, (1937) 32 Ill. L.R. 307, 315.

This article is cited in the Notes of the Rules Advisory Committee for its general analysis of class actions.[6] Thus, it is clear that the class suit device provided by Rule 23 maintains its "vital significance" because of its use in connection with unincorporated associations which can be sued in their common names when jurisdiction is founded upon diversity. 3 Moore's Federal Practice, pp. 3435-6. Instead of showing whole diversity as to all the members, only the citizenship of the representatives who are parties to the action need be shown to be diverse.

In a later article, also cited as authority by

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6. F.R.C.P. 23, Note to Subd. (a). Dean Clark (now Judge, 2 Cir.), the reporter to

the Advisory Committee,[7] the same authors state:

> "Where jurisdiction is founded upon diversity of citizenship, the citizenship of only the original parties to the suit, in the absence of collusion, is material. Unless this were so the possibilities of federal jurisdiction based upon diversity of citizenship would vary inversely with the size of the class. . . . In determining whether or not the parties on one side of a dispute are of a citizenship diverse from the other, the court will look to the citizenship of all the parties of record, and not the absent party's citizenship. . . .
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>
> "To summarize: A new second subdivision to Rule 23 based upon case law could read as follows:

Supreme Court Advisory Committee, has cited this article and that by the same authors, hereinafter cited, as "very interesting and instructive on this important subject." (Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 22, 1938, p. 264); and as authoritative (Proceedings of the Institute on Federal Rules, Wash., D.C., Oct. 6, 1938, p. 66).

7. F.R.C.P. 23, Note to Subd. (a).

"(e) Requisites of Jurisdiction. Where jurisdiction is founded upon diversity of citizenship, the citizenship of only the original parties shall be looked to in the absence of collusion." Federal Class Actions, (1938) 32 Ill. L.R. 555, 565-6.

Barron and Holtzoff are in complete accord with Professor Moore that the solution to the difficulty of the unincorporated association is the use of a class suit under Rule 23, in which only the citizenship of the representatives of the class is looked to. They continue:

"It has been stated that Rules 17(b) and 23 provide alternative methods for bringing such associations into court."[8]

The same writers state:

"Under the general rule it is often impossible to satisfy diversity of citizenship requirements in an action by or against an unincorporated association having members

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8. 2 Barron and Holtzoff, Federal Practice and Procedure, pp. 36-37.

who are citizens of a large number of states. This difficulty, however, may be overcome by the use of a class action by or against representative members whose citizenship is diverse from that of the opposing parties in the action."[9]

In Tunstall v. Brotherhood of Locomotive F. and E., 148 F.2d 403 (4 Cir., 1945), the late eminent Chief Judge Parker (then Judge) discussed the class suit against unincorporated unions. He made clear the long standing of the class suit device and the great need it filled in our jurisprudence, pointing out that"even in a state. . .which adheres to the common law rule that an unincorporated labor association may not be sued as an entity," (405) it may be sued through representatives as a class. It follows, then, that where the union may be sued as an entity, it may clearly be sued in a class action. The opinion continues, at page 405:

"The federal rules have in no wise limited or restricted the right to bring class suits in proper cases. Rule 23 provides for them; and, in a note to the rule, the Rules Committee states

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9. Barron and Holtzoff, op. cit. supra, Vol. 2, p. 180.

that it is a substantial restatement of the former equity rule as that rule has been construed by the courts. . . .

* * * * * * *

"And there is nothing in Rule 17(b) which limits the right to bring a class suit under Rule 23(a) in proper cases. . . . There is nothing in this that limits the right to bring the unincorporated association into court by means of a class suit in accordance with the prior practice; and the right to bring such class suit continues to be of great value when the right to sue the association in its common name is, for any reason, unavailable. Instances where it is not available are cases where jurisdiction based on diversity would be defeated by a suit by or against the association but not by a suit by or against representatives. . . . The manifest purpose of the provision of Rule 17(b) relating to suits against partnerships and unincorporated associations is

to add to, not to detract from, the existing facilities for obtaining jurisdiction over them. The language of Rule 17(b) relating to suits against partnerships and unincorporated associations is permissive. So, also, is the language of 23(a). Together they provide alternative methods of bringing unincorporated associations into court." (Emphasis supplied.)

This Honorable Court would limit the Tunstall case to situations where jurisdiction is based upon a federal question, but not where based upon diversity of citizenship. However, Judge Parker deemed it necessary to discuss class suits as apply in the instant case and made it clear that these alternative methods exist in diversity cases.

Further, the treatises treat the Tunstall case as authority for use of these alternatives where federal jurisdiction is founded upon either basis. 3 Moore's Federal Practice, page 1413, note 23; 2 Barron & Holtzoff Federal Practice and Procedure, pages 36-7, note 28; 3 Goodrich-Amram Pa. Proc. Rules Syc. (1957 Supp.), Sec. 2153(a)2, p. 23. Judge Sanborn similarly considered the case in

Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8 Cir., 1948).

The applicability of Rule 23(a) to all suits which may benefit from its "great value," as described by Judge Parker in the Tunstall case (405) was similarly discussed by Judge Sanborn in Montgomery Ward & Co. v. Langer, supra. This was a diversity class action against two unincorporated unions. The court emphasized the broad application of Rule 23 (p. 186) and expressed an eloquent plea for its liberal use, declaring (at page 187) that the:

> "class action was an invention of equity. . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups. . . from enforcing their equitable rights nor grant them immunity from their equitable wrongs"; (Emphasis supplied)

that its usefulness will depend upon the attitude of the courts, and that if they "will permit the Rule to operate in all cases to which it justly and properly may be applied, it will serve its intended purpose."[10] After discussing the

10. This request, it should be noted, is a plea for the liberal grant of entry to the federal courts as intended by the Supreme Court. To refer the dismissed

alternatives provided by Rules 17(b) and 23(a) Judge Sanborn concluded:

> "We know of no practical reason why the procedure prescribed by Rule 23(a)(1) should not be as fair and as effective in enabling unincorporated associations to sue or be sued as is the procedure -- which prevails in many jurisdictions -- of permitting them to sue or defend under their common names. Where such associations have the status of legal entities, the members who act for them in bringing or defending actions are in reality the representatives of the membership as a whole."

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plaintiff to the state court for solace is not the answer. We must assume that Judge Sanborn is well aware that the latter tribunals may grant relief in most cases. He speaks against the background of Judge Parker's language in Tunstall (p. 405) which points out that where "jurisdiction based on diversity would be defeated" but for a class suit, Rule 23 is the remedy to save the federal jurisdiction.

A situation similar to the instant case was present in International Allied Printing Trades Assn. v. Master Printers Union, 34 F. Supp. 178 (D.C., N.J., 1940). Two unincorporated unions brought suit in their common names. Jurisdiction was based upon diversity of citizenship. Under F.R.C.P. 17(b) the plaintiffs could sue in their common names, since New Jersey statute, like Pennsylvania, so provides. The court held that there must be diversity as to all members. But, the court continued, at page 181:

> "Allied and Typographical cannot meet the requirements of diversity of citizenship and their escape, if any, is in the class action (Rule 23), where only the citizenship of the representative or representatives need appear. Moore's Federal Practice, Vol. 2, page 2100."

Stating a desire to pass upon the merits of the matter and "relying upon the spirit and the word of the Federal Rules of Civil Procedure," the court did not dismiss the action for want of jurisdiction, but reopened the case to afford one of the plaintiffs opportunity to proceed under Rule 23.[11]

11. This opportunity was not afforded the other plaintiff union, because of a prior adjudication on the merits.

Similarly, in Malarney v. Upholsterers' Intl. Union, 7 F.R.D. 403 (E.D Pa., 1947), a class suit was brought against an unincorporated union. The defendant contended that there was no diversity of citizenship, since some of the individual members of the union resided in the same state as the plaintiff; that the suit was brought "against a separate and distinct entity, the unincorporated association." The court said, at 405:

> ". . .But as has already been observed, this Court's conception of the action is that it is primarily a class action brought by a plaintiff against the officers representing the members of the class. In class actions the question of diversity is determined by the citizenship of the members who are sued as representatives and federal jurisdiction will not be defeated even if there are other members of the defendant class who may be of the same citizenship as the plaintiff. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673; Philadelphia Local 192 of American

Federation of Teachers v. American Federation of Teachers, D.C., 44 F. Supp. 345. It is apparent from the application of the foregoing principle to the present case that diversity of citizenship exists."

It is clear, then, that Rule 17(b) is not exclusive, and that Rule 23(a) stands beside it as a method which may be chosen to sue an unincorporated association, not limited by it in any way. Rule 23 may be used where right to sue an association in its common name is unavailable, whether the unavailability be because there is no federal question and no state provision therefor (see Montgomery Ward & Co. v. Langer, supra), or because diversity would be defeated by suit against the common name. (International Allied Printing Trades Assn. v. Master Printers Union, 34 F. Supp. 178 (D. N.J., 1940)).

Nor does the fact that there may be a federal rule or statute permitting suit against an association as an entity prohibit the class action against such association. Thus, in Tisa v. Potofsky, 90 F. Supp. 175 (S.D., N.Y.,

1950), there was a suit for injunction against three persons "individually as members and representatives of" the union executive board. Federal jurisdiction was alleged upon diversity of citizenship. Defendants contended that the suit was not maintainable as a class action because "class actions in the federal courts by or against labor unions were abolished by Section 301 of the Labor-Management Relations Act, 29 U.S.C.A., Sec. 185(b)." This contention relied on the provision in that statute that any labor organization "may. . . be sued as an entity." Judge Rifkind said, at page 180:

> "There is no inconsistency in permitting unions to sue and be sued in their common names and at the same time allowing them to sue and be sued by the device of the class action. Cf. Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 4 Cir., 1945, 148 F.2d 403.
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> "As this case indicates, the class suit continues to serve a useful function. If the class suit is to be considered abolished in this field, it can be only because of the clearly expressed mandate of Congress. I do not find

such an intention in the language of 29 U.S.C.A. Sec. 185(b). In fact, the language used is expressly permissive: 'may sue or be sued as an entity* * *'."

Accord: Lemley, Ch. J., in Ketcher v. Sheet Metal Workers' Intl. Assn., 115 F. Supp. 802, at 811-12 (E.D. Ark., 1953); see Advertising Special Nat. Assn. v. Federal Trade Comm., 238 F.2d 108, 119 (1 Cir., 1956).

This Honorable Court states that the law of Pennsylvania "has forbidden a suit by or against an unincorporated association to be maintained as a class action," and that, therefore, it must be sued as an entity in the federal court (opinion, pp. 5-6).

It is respectfully submitted that the fact that a union may be sued (or must be sued) as an entity under Pennsylvania law does not prevent the federal practice from applying in the federal court. F.R.C.P. 23 still serves its useful function by means of which federal jurisdiction becomes available in accordance with the intent behind it. Just as the effect of this federal rule cannot be deemed to have

been abolished in absence of "the clearly expressed mandate of Congress," so, fully, is the state rule wholly impotent to act upon it in derogation of the federal practice, and to deprive the federal court of jurisdiction. Although it may be stated that a state procedural rule can forbid a class action against an unincorporated association, such rule cannot prevent the operation of the federal rule from giving effect to its class action provision. All that the Pennsylvania rule has done is provide a method whereby "it shall be sufficient" to sue such defendant by using its common name. As has been stated by the courts and authorities, the class action method provided by federal law is still applicable. The federal law seeks of the state only capacity to be sued. It is established that the union has such capacity and, further, by Pa. R.C.P. 2153(a), it is sufficient to use the union's common name. At this point, the state's effect ends. The federal rule then is solely applicable.

Just as under F.R.C.P. 17(b), where the cause of action is federal in nature, a defendant association may be sued in its common name, and so named in a class action,[12]

12. United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 66 L. Ed. 975; Advertising Special Nat. Assn. v. Federal Trade Comm., 238 F.2d 108, 119 (1 Cir. 1956).

so may an association, which under state law can be sued in its common name, be made a defendant by virtue of the class action rule. Otherwise, the state rule would be given greater effect in the federal courts than the federal rule itself. Obviously, such a result cannot be permitted.

Although state law may, under F.R.C.P. 17(b) define capacity of a party, its application and intervention must be strictly construed, and limited to the specific position accorded it by the federal rule.

> ". . .State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it." Guaranty Trust Co. v. York, 326 U.S. 99, 106, 89 L. Ed. 2079, 2084-5.

On the other hand, the Federal Rules are to be liberally construed "to secure the just, speedy and inexpensive determination of every action." F.R.C.P. No. 1. 2 Moore's Federal Practice, Sec. 1.13, pp. 55-7.

Further, the opinion of this court presupposes that the question of class suit is encompassed in the term "capacity." But, reference to the contents of the Federal Rules makes it clear that their proponents did not think so. Otherwise, Rule 23 would have been part of Rule 17, instead of a separate and special provision. Where a general provision in a rule or statute is in conflict with a particular provision in the same or another rule or statute, the two must be construed to give effect to both. If they are irreconcilable, the particular provision must prevail. Crawford, The Construction of Statutes (1940), Section 167. Upon this basis alone, Rule 23, being a specific mechanism provided to solve a definite problem, must prevail. This is not only because it is specifically upon the subject of class actions, but because, in addition, such application will better satisfy the spirit of the Federal Rules.

It should be noted here that the language of Pa. R.C.P. 2153(a), concerning actions against associations, referred to by this Honorable Court in the opinion (p. 5, note 3) is also expressly permissive in its language. Further, Pa. R.C.P. 2153(a) provides a change in procedure

to permit suit against an association in its common name for two practical reasons, intended to benefit plaintiffs and solve a definite problem which had specifically hindered persons in bringing claims against unincorporated associations. This rule, thus, was made for two reasons: (1) a plaintiff might be unable to ascertain the names of officers and members of an unincorporated association; and (2) laymen generally consider unincorporated associations entities just as corporations. 3 Goodrich-Amram Pa. Proc. Rules Svc. Sec. 2153(a)(2), pp. 9-10. Thus, the change was made to remedy the problems of the plaintiff, and to render bringing a suit easier for him. To use this rule to curtail methods of suit previously open to a plaintiff in the federal court would run directly in the face of the intent of the rule.

The commentary in Goodrich-Amram (Vol. 3, Sec. 2152-2) states that prohibition of class suits is implicit in Rule 2152. This is clearly because the rule states that in actions by associations they "shall be prosecuted", etc. Pa. Rule 2153, concerning actions against associations, states that "it shall be sufficient", etc. We must assume

that the words used were chosen advisedly. The fact that two consecutive paragraphs upon the same subject and aspect thereof are differently worded indicates clearly that different meanings were intended. The latter rule is obviously permissive in nature.

Further, in this commentary, the authors state that the Rules Committee note to Pa. Rule 2230(a) states that suits by associations cannot be brought as class suits. It is submitted that Pa. Rule 2230, concerning class actions, is a section of the Pennsylvania procedure on Joinder of Parties, and does not purport to affect capacity, which is all that F.R.C.P. 17(b) is concerned with. It must be observed also that the provision permitting suit against unincorporated associations as entities was provided to relieve litigants in such cases of the limitations which exist where such suit is not permitted. See commentary, Goodrich-Amram (Vol. 3, Sec. 2152-2).

The opinion of this court loses sight of the very reason for the federal class suit device which, even long before the new federal rules, was used to solve the problem

of federal diversity jurisdiction in unincorporated associations. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 363-6, 65 L. Ed. 673, 678-9;[13] Barron & Holtzoff, Vol. 2, page 176.

It is respectfully submitted that the decision of this Honorable Court:

(1) interprets "capacity" as included in F.R.C.P. 17(b) contra to the meaning and extent intended by its own authors and its fellow Rules; and

(2) applies F.R.C.P. 17(b) so as to cause it to borrow more than capacity from the state practice; and

(3) relegates F.R.C.P. 23(a) to the position of a second-class Rule, without effect even where specifically applicable, and subject to a conflicting state rule; and thereby

(4) permits the state practice to nullify in the federal court the federal practice in a field where the latter has specific application.

13. Cited by Federal Rules Advisory Committee, F.R.C.P. 23, note to subd. (a), clause (1).

This decision will have the broad effect of depriving to unincorporated associations of national membership entry into the federal courts. Such a widespread deprivation of federal jurisdiction for or against so great a class is in direct conflict with the purpose and spirit of the Rules. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8 Cir. 1948). It wipes out as to this segment of litigants a method of procedure long recognized by the courts, and thereby infringes upon historic federal jurisdiction.

This jurisdictional question was not heretofore raised in this case, either in the court below or in this court. We respectfully request that a rehearing be granted so that this issue may be further reviewed.

II. The Imposition of Costs

This Honorable Court granted costs against the plaintiffs in these matters. In No. 12,267, the judgment was "affirmed," although it is clear from the opinion that, as to the major issue, the appeal was dismissed for want of jurisdiction. In that case costs were specifically awarded. In the other appeals, the actions were dismissed. Nos.

12,268 and 12,289 for want of jurisdiction, and Nos. 12,269 and 12,270 because the question has become moot.

Concerning No. 12,267, in view of the fact that the major issue was actually dismissed for want of jurisdiction, it is submitted that Rule 35(1) of this court provides only for costs incident to the motion to dismiss. Since there was no motion nor argument by defendants to dismiss upon the issue involved in the opinion, it is submitted that, should rehearing be denied, costs should not be allowed in this appeal.

The same applies to Nos. 12,268 and 12,289, which were specifically dismissed for want of jurisdiction.

As to the other appeals, in view of the peculiar circumstances in this case, it is respectfully suggested to the court that, considering the nature of the matter, in good equity and conscience costs should not be assessed against plaintiffs, who have already suffered considerable losses and sanctions in this matter.

II. The Affirmance in Underwood v. Maloney

In Underwood v. Maloney, No. 12,267 (D.C. No. 14,398) this court affirmed on the merits as to Maloney

individually. This decision may be construed to be res judicata as to the merits of this case in any future action which may be taken. Therefore, it is respectfully requested that such judgment be amended, in the event of a denial of a rehearing upon the major aspect hereof, so that a future action will not be prevented in a proper tribunal.

IV. The Injunction

The injunctions entered by this court at Nos. 12,269 and 12,270 have been vacated. As a result, the entire question may be rendered moot by reason of steps which may be taken by the defendants. It is, therefore, respectfully requested that, in the event a rehearing be not granted upon the major issue hereof, the injunction entered by this court be continued in effect pending the action of this court upon the present petition. No hardship can accrue from the continuation of these injunctions

Respectfully submitted,

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I hereby certify that this petition is presented in good faith and not for delay.

Abraham E. Freedman